

- (2) Whether respondent's appeal from the Order Nunc Pro Tunc dated August 22, 1994, was timely.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

(1) Claimant suffered accidental injury arising out of and in the course of her employment with respondent on March 19, 1992. This matter was litigated between claimant and respondent with claimant ultimately being referred for vocational rehabilitation assessment and training. The matter was settled between claimant and respondent on February 2, 1994, as to all issues including vocational rehabilitation. Subsequent to the settlement, claimant was advised that certain vocational rehabilitation expenses, specifically \$853.00 in tuition and \$310.81 for books, had not been paid by the respondent as was claimant's earlier understanding. Claimant provided evidence that she had been assured by respondent's representative, Mr. Steven Slomiany, that these bills had been paid. Claimant further introduced into evidence a November 23, 1993 letter from Mr. Slomiany to Carmen Bribiesca, Wichita State University, regarding the respondent's liability for certain costs associated with claimant's enrollment at Wichita State University as part of her vocational rehabilitation program. Claimant argued respondent's representative had misled her into believing these bills had been paid when, in reality, they had not. Respondent argued the settlement of February 2, 1994, settled for all time the issues regarding vocational rehabilitation and respondent's failure to pay these bills was part and parcel of the settlement.

The Administrative Law Judge, in his Order of July 12, 1994, found that the vocational rehabilitation bills submitted by claimant were to be paid. He further found respondent's agent, Steven Slomiany, had agreed to pay these bills and had told claimant they had been paid prior to the Settlement Hearing of February 2, 1994. This Order was not appealed.

Claimant and respondent reappeared in front of the Administrative Law Judge and obtained an Order Nunc Pro Tunc dated August 22, 1994, which listed the vocational rehabilitation bills in the amount of \$853.00 and \$310.81 for tuition and books and ordered same paid.

The decision by the Administrative Law Judge requiring payment of these vocational rehabilitation bills appears to be supported by the evidence in the record. Claimant's uncontradicted testimony that she had been advised by respondent's agent that these bills had been paid justifies the failure by claimant to specify that these bills were to be paid as part of the settlement. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The claimant's testimony, when considered in light of claimant's Exhibit 1 to the Preliminary Hearing, supports claimant's contention that these bills were to have been paid prior to the settlement of February 2, 1994. The Appeals Board finds the Order by Administrative Law Judge John D. Clark, requiring payment of the bills in the amount of \$853.00 and \$310.81 for tuition and books, is appropriate and supported by a preponderance of the credible evidence.

(2) The appeal by respondent from the Nunc Pro Tunc Order of August 22, 1994, was timely.

The purpose of a Nunc Pro Tunc Order is to provide a means for entering the actual judgement of the trial court which for one reason or another was not properly recorded. Wallace v. Wallace, 214 Kan. 344, 520 P.2d 1221 (1974).

"If the journal entry fails to accurately reflect the judgement actually rendered it is the duty of the court to make it speak the truth [citation omitted] and that may be done after the term in which the judgement is rendered [citations omitted] even though it be fifty-five years thereafter . . .

Briefly stated, the purpose of a *nunc pro tunc* order is not to change or alter an order or judgment actually made. In other words its function is not to make an order now for then, but to enter now for then an order previously made" Mathey v. Mathey, 175 Kan. 446, 450, 451, 264 P. 2d 1058 (1953).

"Where matters which are an essential part of a judgment are inadvertently omitted from its written text, with the effect that it does not fairly recite what the court intended, and perverts that intention, the omitted matter may be supplied and the journal entry of judgment corrected even after the close of the term, at the instance of an interested party." Cazzell v. Cazzell, 133 Kan. 766, § 2, 3 P.2d 479 (1931).

While the amounts due and owing under the vocational rehabilitation plan could be gleaned from a review of the preliminary hearing transcript, the original order of July 12, 1994, did omit specific reference to these amounts. The Order Nunc Pro Tunc issued August 22, 1994, by the Administrative Law Judge, did fairly recite the Court's intentions in supplying the omitted dollar amounts due and owing. As such, the Order Nunc Pro Tunc of August 22, 1994, did not alter or change judgment but did in fact include materials inadvertently omitted from the original order. As such, the Court had a duty to make its order speak the truth "even though it be fifty-five years thereafter." Mathey supra at 450. The Appeals Board therefore finds the appeal of respondent from the August 22, 1994 Nunc Pro Tunc Order of Administrative Law Judge John D. Clark was timely filed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Nunc Pro Tunc Order of Administrative Law Judge John D. Clark, dated August 22, 1994, is affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of January, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBERDISSENT

I disagree with the decision of the majority. This appeal arises from a hearing on a motion seeking a ruling from an Administrative Law Judge interpreting a settlement agreement between the parties which had been approved by and made the award and order of a Special Administrative Law Judge. In other words, Administrative Law Judge John D. Clark was being asked by the parties to decide what the parties had agreed to and/or to explain what another Administrative Law Judge had ordered. To do this, Judge Clark went outside the record and permitted testimony concerning telephone conversations that occurred between claimant and an insurance adjuster; conversations that presumably took place without counsel for either party being present. This evidence was received to explain a settlement agreement negotiated by counsel. To further "clarify" what the terms of the settlement were, correspondence between an insurance adjuster and a third party was introduced into evidence.

The Administrative Law Judge should not have gone outside the four corners of the settlement agreement unless its terms were vague or ambiguous. The Form 12 Work Sheet for Settlements introduced at the February 2, 1994 Settlement Hearing before Special Administrative Law Judge James R. Roth provided that the basis of the compromise settlement was a lump sum payment of "\$45,000.00 on a strict compromise of the following issues: Approximate 40% general body disability, less present day value discount; plus amount in lieu of vocational rehabilitation. Respondent agrees to reimburse claimant up to the statutory limit for incurred unauthorized medical expense, plus payment of any outstanding authorized medical expenses incurred prior to settlement hearing."

The Court inquired at the start of the settlement hearing whether all parties agreed to the facts which appeared on the Work Sheet for Settlements. Counsel for both claimant and respondent agreed. Claimant was asked if she understood that by settling her claim she was "... giving up all other rights under the Workers' Compensation Act such as possible vocational rehabilitation ...". Although it was specifically pointed out that medical bills incurred prior to the hearing would be paid as a part of the settlement, there was no such statement with regard to vocational expenses. Claimant and her attorney asked the Special Administrative Law Judge to approve the settlement and claimant acknowledged her acceptance of the check for \$45,000.00 "as full, final and complete settlement of [her] claims in this case and the award just entered." The record seems clear on its face. If there was any misunderstanding as to the payment of vocational rehabilitation expenses then it was a mutual mistake of both claimant and respondent. The settlement award should either be given its plain meaning without resort to extrinsic evidence or the settlement should be set aside due to a mutual mistake of fact.

BOARD MEMBER

c: Roger C. Kidd, Wichita, KS
Eric K. Kuhn, Wichita, Ks
John D. Clark, Administrative Law Judge
George Gomez, Director